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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Respondent, v. RAYMOND Q. GAITAN, Petitioner.	2 CA-CR 2009-0266-PR DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-31931

Honorable Howard Hantman, Judge

REVIEW GRANTED; RELIEF DENIED

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H O W A R D, Chief Judge.

¶1 In this petition for review, Raymond Gaitan challenges the trial court's order denying his petition for post-conviction relief after an evidentiary hearing. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear

abuse of discretion." *State v. Swoopes*, 216 Ariz. 390,¶4, 166 P.3d 945, 948 (App. 2007). We see no such abuse here.

¶2 Although we do not have a complete record before us, it appears that Gaitan was charged in 1991 with attempted first-degree murder of a fellow prison inmate, conspiracy to commit first-degree murder, and two counts of dangerous or deadly assault by a prisoner. The victim had been struck on the head by Gaitan's codefendant Miguel Berroteran while all three and others were at the "weight pile." The first jury trial apparently ended in a mistrial as to the charges against Gaitan; according to the state, Berroteran, however, was found guilty of attempted murder and various counts of assault. But after a second jury trial, in which Gaitan and Berroteran were tried together on the conspiracy charge, Gaitan was convicted of conspiracy to commit first-degree murder and sentenced to a life term of imprisonment. This court affirmed the conviction and sentence on appeal, rejecting Gaitan's argument that reversal was warranted because the trial court had erroneously given the jury a *Pinkerton*[1] instruction. *State v. Gaitan*, No. 2 CA-CR 91-0897 (memorandum decision filed Dec. 14, 1993). We found the court did err by giving the instruction but that the error was harmless.

¶3 Gaitan sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P. The trial court denied his first petition. He filed a second petition in propria persona in which he raised a claim of newly discovered evidence and contended appointed counsel in the first post-conviction proceeding had been ineffective; the trial court again denied relief. Gaitan sought review by this court and, although we granted review, we denied

[1]*United States v. Pinkerton*, 328 U.S. 640 (1946).

relief. *State v. Gaitan*, No. 2 CA-CR 00-0186-PR (memorandum decision filed Nov. 2, 2000).

¶4 In the petition for post-conviction relief at issue here, Gaitan contended he was entitled to relief based on newly discovered evidence, *see* Ariz. R. Crim. P. 32.1(e), that established he was actually innocent because he "did not know that the object of the Conspiracy was the murder of" the victim. The newly discovered evidence consisted of the affidavit of codefendant Berroteran and a digitally enhanced video of the assault. Gaitan maintained he had not testified at trial in 1991 because he had been afraid he "would have been 'branded' as a stoolie, and basically [been] beat[en] up all the time for the remainder of his time in prison[,] which may have been for a duration of a life sentence." He argued the new evidence would have supported his defense that he had not known Berroteran's intent was to assault the victim with a metal weight bar; rather, he contended he had agreed to bring the victim to the weight pile so he and the others could "jump" the victim, or beat him up, not try to murder him. Gaitan argued that, if Berroteran had testified at trial consistently with his affidavit, Gaitan would have testified as well, and there could have been reasonable doubt regarding his involvement.

¶5 Disagreeing with the state, the trial court found Gaitan had raised a colorable claim for relief and was therefore entitled to an evidentiary hearing. At the April 2009 hearing, Gaitan, his former counsel, Brian Metcalf, and Berroteran testified, and Gaitan attempted to introduce the 1999 affidavit of Officer Gutierrez, which he contended was exculpatory because it conflicted with and discredited the evidence the

state had presented at trial.[2] Gaitan testified that on the day of the underlying incident, Berroteran had told him to go get the victim, who had been near the basketball court, and to bring him to the weight pile because Berroteran was going to "jump him," "fight with him," and hit him, although Gaitan did not know why. Gaitan admitted he had known at the time of trial that Berroteran had information that could be helpful to his defense. He testified he had told Metcalf, but he admitted he had not told appellate counsel or counsel who had represented him in the previous Rule 32 proceedings. Additionally, he admitted he could have told the jury he had had no idea Berroteran was going to try to kill the victim, rather than merely fight with him, had he chosen to testify at trial. But he explained he had been afraid to testify because he would have been required to implicate Berroteran and was afraid he would be "beaten up" or his family killed. Metcalf testified Gaitan had been afraid to testify because "he would be labeled a snitch . . . ." But Metcalf did recall telling Gaitan his case would be stronger if he testified.

¶6 Berroteran testified he had never told Gaitan he wanted to kill the victim. He testified further that the only thing Gaitan had known at the time was that Berroteran had wanted Gaitan to get the victim and bring him to the weight-lifting area so Berroteran could "beat his ass," because the victim had thrown coffee on Berroteran. He also testified he had not been certain what he was going to do to the victim until he did it. According to Berroteran, he had wanted to help Gaitan but could not testify at trial; he had been advised not to testify and to invoke his Fifth Amendment privilege. Berroteran

[2]The prosecutor pointed out during the evidentiary hearing that the affidavits had been supporting documents for a previous Rule 32 proceeding.

additionally testified he had also been told he had to exhaust his appellate remedies before he could help Gaitan.

¶7 The trial court denied Gaitan post-conviction relief in a thorough, thoughtful, well-reasoned minute entry order. In summary, the court found that although the digitally enhanced video is newly discovered evidence for purposes of Rule 32.1(e), Ariz. R. Crim. P., based on *State v. Cooper*, 166 Ariz. 126, 129, 800 P.2d 992, 995 (App. 1990), "the video is unlikely to have altered the verdict in this case," and, therefore, Gaitan was not entitled to relief on this ground. The court observed: "The enhanced video merely shows a magnified version of the video shown at Petitioner's trial." The court also rejected Gaitan's claim that he would have testified but for his fear for his own safety; the court found Gaitan had made a decision not to testify, that he could have asked for protective custody, and that his testimony was not newly discovered evidence and was not credible. With respect to Berroteran's affidavit and testimony, the court found that, even assuming it could be characterized as newly discovered evidence for purposes of Rule 32.1(e), Berroteran was not credible and his testimony did not support Gaitan's petition for post-conviction relief. Finally, the court found Officer Gutierrez's affidavit did not support Gaitan's petition; it did not constitute newly discovered evidence and, to the extent it conflicted with the evidence presented through other officers at trial, the court found more credible the testimony of Gutierrez's "fellow correctional officers taken at trial shortly after the attack."

¶8 On review Gaitan essentially reiterates the claims he raised in his petition. He insists the court erred because "Berroteran's testimony, Petitioner's proffered

testimony, the digitally enhanced videotape and previously submitted affidavit of an Arizona Department of Corrections Officer could have made a difference in the outcome of his trial."[3] But Gaitan has not sustained his burden of establishing on review that the trial court abused its discretion when it denied Gaitan's petition after the evidentiary hearing.

¶9 The court's application of the law regarding newly discovered evidence is correct, and it did not err in that regard. With respect to the enhanced videotape, as the court correctly noted, it simply enlarges that which the jurors had already been able to see during Gaitan's trial. Gaitan has never challenged the accuracy or clarity of the videotape. For a number of reasons, including the fact that Gaitan did not establish the

[3]Gaitan contends: "Moreover, should this honored Appellate Court find that the evidence presented does not fall within the category of newly discovered evidence pursuant to Rule 32.1(e) A[riz.]R[.]Crim[.]P[.], Petitioner respectfully maintains that the evidence should still be considered (though possibly procedurally barred) because the evidence in issue is proof of his actual innocence." To the extent Gaitan is attempting to assert a claim of actual innocence as contemplated by Rule 32.1(h), he did not develop the claim as a separate legal theory for relief under the rule in his petition for post-conviction relief, although he mentioned his "actual innocence" during the evidentiary hearing. In his reply to the state's opposition to his petition for post-conviction relief, Gaitan did argue the claim independently, albeit without citation to the rule, and he did cite case authority in support of the claim. But he essentially raised a new claim in his reply brief; claims raised for the first time in a reply to the state's opposition to a Rule 32 petition are waived. *See State v. Lopez*, 223 Ariz. 238,¶ 7, 221 P.3d 1052 (App. 2009). Nor has Gaitan adequately developed the claim on review. *See* Ariz. R. Crim. P. 32.9(c)(1)(ii)–(iv); *State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995). But even if he had, we would not be required to address it; claims must be presented first to the trial court. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (appellate court does not consider issues raised in petition for review that "have obviously never been presented to the trial court for its consideration"). Moreover, as the state correctly argued at the evidentiary hearing, the question was really one for a jury. Gaitan essentially blended his claim of newly discovered evidence with a challenge to the sufficiency of the evidence to support the jury's finding of guilt.

outcome would have been different based on this "new" evidence, the trial court did not abuse its discretion in finding the digital video was not newly discovered evidence as contemplated by Rule 32.1(e).

¶10 Additionally, much of the court's ruling on the remaining claims was based on its assessment of the credibility of witnesses. We will not interfere with such an assessment; rather, we defer to the trial court with respect to such determinations, recognizing that the trial court, not this court, is the sole arbiter of witness credibility. *See State v. Fritz*, 157 Ariz. 139, 141, 755 P.2d 444, 446 (App. 1988). In its ruling, the court has identified clearly the claims Gaitan asserted and has resolved them in such a manner that permits this and any other court to review it. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). Moreover, based on the record before us and deferring to the trial court as we are required to do, we have no basis to interfere with the court's correct resolution of these claims. Rather, we adopt the court's ruling. *Id*.

¶11 The petition for review is granted, but we deny relief.

/s/ Joseph W. Howard
JOSEPH W. HOWARD, Chief Judge

CONCURRING:

/s/ Philip G. Espinosa
PHILIP G. ESPINOSA, Presiding Judge

/s/ Virginia C. Kelly
VIRGINIA C. KELLY, Judge